C. MELCHERS & CO. v. KEJURUTERAAN FAUN YEE SDN. BHD.

[A.C.J. (Wan Hamzah J.) July 5, 1984]

[Kuala Lumpur – Civil Appeal No. 37 of 1982]

Contract – Contract between agent and plaintiff – Claim for damages for loss of use of machine – Whether agent liable – Terms of contract – Contracts Act, 1950, s.183(a).

The plaintiff, the defendant and Credit Leasing Bhd. agreed to an agreement whereby Credit Leasing Bhd. should lease to the plaintiff a Charmilles Eleroda 10 Spark Erosion Machine and that the defendant should sell to Credit Leasing Bhd. the machine to enable Credit Leasing Bhd. to lease it to the plaintiff. Pursuant to this arrangement the defendant sold the machine to Credit Leasing Sdn. Bhd. by contract dated June 28, 1977 and Credit Leasing Bhd. entered into an agreement dated February 22, 1978 with the plaintiff for the lease of the machine to the plaintiff (P2). Pursuant to the arrangement a contract dated July 5, 1977 (P1) was executed between the plaintiff and the defendant for the supply of the machine by the defendant.

The plaintiff claimed damages for loss of use of the said machine. The President of the Sessions Court gave judgment for the plaintiff in the sum of $12,000 and costs. The defendant appealed against the decision of the President.

Held, allowing the defendant's appeal: (1) it was not correct for the President to consider the contract between the plaintiff and the defendant as one of sale and purchase. Since the contract P1 was not one of sale and purchase there was no condition of merchantable quality implied in it under section 16(1)(b) of the Sales of Goods Act. Since the contract P1 was not a hire-purchase contract there was no condition of merchantable quality implied under section 6(2) of the Hire-Purchase Act;

(2) it was clear from the documents and other evidence that the defendant sold the machine on behalf of the Switzerland company and that the defendant entered into the contract P1 also as agent for the Switzerland company;

(3) under section 183(a) of the Contracts Act 1950 the defendant as agent for Ateliers des Charmiles SA of Switzerland was bound not only by the contract of the sale of the machine to Credit Leasing Bhd. but also by the contract P1 entered into by the defendant with the plaintiffs;

(4) the "break-down" from May to August 1978 was allegedly the result of mistake of the mechanic in fixing the microfin. The alleged mistakes of the mechanic was not pleaded in the Statement of Claim. Moreover P1 which was dated July 5, 1977 had nothing to do with the microfin which was bought by the defendant under contract P3A of January 12, 1978. It was therefore not correct for the President to find that the defendant was liable for damages under P1 in respect of the failure of the machine to produce the product as expected by the plaintiff from May to August 1978.

CIVIL APPEAL.

Ramesh Sengiri for the appellant.

Tan Jin Chor for the respondent.

Cur. Adv. Vult.

Wan Hamzah J.: On the claim of the Plaintiff for damages for loss of use of a machine known as Charmilles Eleroda 10 Spark Erosion Machine the President of the Sessions Court gave judgment for the Plaintiff in the sum of $12,000 and costs. The Defendant appeals against the decision of the President.

The following are the several issues raised in the pleadings:–

(a) The Plaintiff alleges that it had purchased the machine from the Defendant. The Defendant denies, and contends that there was no contract at all between the Plaintiff and the Defendant.

(b) The Plaintiff alleges that the machine was guaranteed by the Defendant for one year.

The Defendant denies. The Defendant admits that it gave a warranty but contends that the warranty was of no effect as it was not supported by any consideration on the part of the Plaintiff.

(c) The Plaintiff alleges that there was an express or implied term in the agreement between them that the Defendant should supply to the Plaintiff a machine of merchantable quality. The Defendant denies.

(d) The Plaintiff alleges that the Defendant supplied to the Plaintiff a machine which was not of merchantable quality and which did not function satisfactorily from the outset. The Defendant denies.

(e) The Plaintiff alleges that on or about May 20, 1978 the machine broke down completely and was not repaired and restored to working condition by the Defendant until August 30, 1978. The Defendant denies.

(f) The Defendant alleges that the machine was sold to Credit Leasing and Finance Corporation (M) Sdn. Bhd. [hereafter referred to as Credit Leasing Bhd.] by Ateliers des Charmilles SA of Switzerland, and that in the sale the Defendant was acting as agent for the seller. Therefore the Defendant contends that this action being an action against the agent is an action against the wrong party.

(g) The Defendant contends that under the General Conditions for the Supply of Plant and Machinery for Export prepared by the United Nations the Defendant cannot be liable for loss unless it is guilty of gross misconduct as a vendor, and the Defendant denies such misconduct.

(h) The Defendant avers that the Plaintiff and its servants or agents were using the machine not in accordance with the manufacturer's recommendations thus causing the machine not to function at the optimum.

(i) The Defendant avers that the Plaintiff did not allow the Defendant's servants or agents to provide repair service on the machine.

The first question to be considered was whether there was any contractual relationship between the Plaintiff and the Defendant, and if there was such relationship what was the nature of the contract between them and what were the terms of the contract. The President found that there was a contractual relationship between the Plaintiff and the Defendant, and it appears that the President considered the contract between them to be one of sale and purchase. In my opinion it is clear from some of the documents produced at the trial, i.e. Exhibits D12, D18, P1 and P2, that three parties, i.e. the Plaintiff, the Defendant and Credit Leasing Bhd. agreed to an arrangement whereby Credit Leasing Bhd. should lease to the Plaintiff a Charmilles Eleroda 10 Spark Erosion Machine and that the Defendant should sell to Credit Leasing Bhd. the machine to enable Credit Leasing Bhd. to lease it to the Plaintiff. Pursuant to this arrangement the Defendant sold the machine to Credit Leasing Bhd. by contract dated June 28, 1977 (D18), and Credit Leasing Bhd. entered into an agreement dated February 22, 1978 with the Plaintiff for the lease of the machine to the Plaintiff (P2). Also pursuant to the arrangement the Plaintiff put up a contract (P1) to be executed between the Plaintiff and the Defendant for the supply of the machine by the Defendant, which the Plaintiff forwarded to the Defendant for execution. This contract was dated July 5, 1977 and it was duly signed by the Plaintiff and the Defendant. Therefore there was a contract between the Plaintiff and the Defendant, but the contract between them was not one for the sale of the machine by the Defendant to the Plaintiff, although in the contract P1 the Plaintiff was called the Purchaser. The object of P1 was that the Defendant should supply the machine and make it available for Credit Leasing Bhd. to lease it to the Plaintiff. Thus the Defendant became the seller of the machine to Credit Leasing Bhd. In my judgment it was not correct for the President to consider the contract between the Plaintiff and the Defendant as one of sale and purchase. Since the contract P1 was not one of sale and purchase there was no condition of merchantable quality implied in it under section 16(1)(b) of the Sales of Goods Act. Since the Contract P1 was not a hire-purchase contract there was no condition of merchantable quality implied under section 6(2) of the Hire-Purchase Act.

When P1 was sent by the Plaintiff to the Defendant for execution the Defendant on signing it added to Clause 3 in P1 the following term (hereafter referred to as the added term):—

> "Charmilles guarantee the good quality and execution of the delivered goods during 12 months from date of the commissioning. This warranty covers defective material and defaults of manufacture which could appear during the abovementioned period and during this time they are responsible for repairs and replacement of parts verified defective. The repairing or replacement will be free of charge and they reserve the right to ask for the return of the defective parts, carriage free. This warranty ceases immediately if the buyer repairs or modifies the equipment, either himself or any other person without previously obtaining our approval."

Siah Cheong Hee (P.W.1), a director of the Plaintiff Company, when giving evidence, stated that when the Defendant added the above term to Clause 3 he disagreed with it and protested to the sales representative of the Defendant. By that he implied that the term added by the Defendant was not a binding term and it was not part of the contract between the Plaintiff and the Defendant. In my judgment it is too late now for the Plaintiff to reject the added term as it must be taken that the Plaintiff had by its conduct accepted the added term, because after P1 had been executed by the Defendant and returned to the Plaintiff, the Plaintiff proceeded to enter into lease agreement (P2) with Credit Leasing Bhd. on February 22, 1978 and took delivery of the machine in about February/March 1978 knowing that one of the Defendant's terms for the supply of the machine was the added term. If the Plaintiff did not wish to accept the added term it should not have entered into the lease agreement and taken delivery of the machine, or it should have taken steps to ensure that the added term was removed before it entered into the lease agreement and took delivery of the machine.

In its letter to the Defendant dated March 7, 1978 (Exhibit D21) the Plaintiff referred to warranty during the period of 12 months in respect of "repairs or replacement of parts verified defective". These words are words taken from the added term, showing that the Plaintiff recognised the added term as binding. In its letter of reply dated March 16, 1978 (Exhibit P5) the Defendant stated, *inter alia*, as follows:—

> "You are right in stating that Charmilles guarantee the good quality and execution of the delivered goods during 12 months from date of the commissioning. This warranty covers defective material and defaults of manufacturer which could appear during the abovementioned period and during this time they are responsible for repair or replacement of parts verified "defective". However, please take note this warranty does not cover parts that are modified or damaged by your goodselves."

There is no evidence to show that the Plaintiff after receiving the reply, protested to the effect that the above statement was incorrect.

I have disposed of issues (a), (c) and (d). As I have stated earlier, the Defendant contends that the added term was of no effect on the ground that it was not supported by consideration on the part of the Plaintiff [issue (b)]. In my judgment there was consideration on the part of the Plaintiff in that the Plaintiff promised to enter into a lease agreement with Credit Leasing Bhd to enable the Defendant to sell the machine to Credit Leasing Bhd., who would not have bought it if there was nobody ready to take lease of it.

As the result of the added term, Clause 3 in P1 consists of two parts: first the original term, and second the added term. The original term reads as follows:–

"The Supplier hereby agrees to guarantee the Charmilles Eleroda 10 machine for one (1) year, during which the Supplier agrees to assist the Purchaser in obtaining the electrodes such as graphite and other parts at the cost of the Purchaser to the best of his ability."

This original term is vague in that it does not say against what defect or disability the "guarantee" was. I believe that because of the vagueness the parties agreed to the added term as explanatory to the "guarantee" in the original term and as an addition to the original term.

I have referred to the Defendant's contention that it was acting as agent for Ateliers des Charmilles SA of Switzerland and that this action being an action against the agent is an action brought against the wrong party [Issue (f)]. In my opinion it is clear from the documents produced at the trial and from other evidence, that the Defendant sold the machine on behalf of the Switzerland company and that the Defendant entered into the contract P1 also as agent for the Switzerland company. Section 183 of the Contracts Act reads as follows:-

"In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Such a contract shall be presumed to exist in the following cases:

(a) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;

(b) where the agent does not disclose the name of his principal; and

(c) where the principal, though disclosed, cannot be sued."

P.W.1 testified to the effect that Defendant did not disclose to the Plaintiff that it was for Ateliers des Charmilles SA, the manufacturers of the machine. But evidence shows that the Plaintiff ought to know that the Defendant was acting as agent for the manufacturers. At the commencement of the negotiation for the transactions the Defendant sent letters D11 and D17 to the Plaintiff giving various particulars about the machine. In both of these letters the name of the manufacturers and their address in Switzerland were stated and the writer of the letters was stated as "C. Melchers & Co., S.E.A. Agency, Kuala Lumpur". Both letters contained the following remark: "Subject to our principal's final confirmation". Furthermore, in the added term in P1 "Charmilles" was mentioned. Therefore section 183(b) of the Contracts Act does not apply to this case. But in my judgment section 183(a) applies here. Section 183(a) does not say that the agent is bound only by the contract for the sale and purchase of the goods. In my judgment the agent is bound also by a contract entered into by him as agent, in connection with a contract for the sale and purchase of the goods entered by him. In the present case there was a contract entered into by the Defendant as agent, for the sale of the machine to Credit Leasing Bhd, and the Defendant as agent also entered into contract P1 with the Plaintiff in connection with and for the purpose of facilitating the contract of sale to Credit Leasing Bhd. Therefore under section 183(a) the Defendant as agent for Ateliers des Charmilles SA of Switzerland was bound not only by the contract of the sale of the machine to Credit Leasing Bhd. but also by the contract P1 entered into by the Defendant with the Plaintiff. Thus the Plaintiff can properly sue the Defendant on the contract P1, particularly on Clause 3 with the added term.

I shall now deal with issue (e) and examine the evidence to ascertain whether the Plaintiff's allegation is true that the machine broke down on or about May 20, 1978 and was not repaired and restored to working condition by the Defendant until August 30, 1978. If this allegation was true the Defendant might be guilty of breach of the added term by which the Defendant had given a warranty covering defective materials and defaults of manufacture appearing during the period of twelve months expiring in about February/March 1979, and by which the Defendant had

undertaken to do repairs and replacement of defective parts free of charge. It should be noted that as there was no condition of merchantability as already stated above, any complaint of unmerchantability at any time is irrelevant; and the only period of defect and disrepair which is relevant in this case is the period from May 20, 1978 to August 30, 1978 as this is the only period of defect and disrepair alleged by the Plaintiff in the Statement of Claim relevant under the added term. The added term does not contain a promise that the machine will not break down so as to render the Defendant liable for damages for the breakdown. The added term merely contains a promise that in the event of a breakdown during the warranty period of 12 months the Defendant should repair or replace defective parts of the machine appearing during the warranty period and the repair and replacements would be done free of charge.

The President of the Sessions Court made a finding that the machine did not break down completely but that it failed to produce the product as expected by the Plaintiff during three months from May to August 1978. He also made a finding that in P1 the Defendant gave a warranty to the effect that it would be responsible for repairs and replacement of parts verified defective, and that the Defendant had failed to do so until August 30, 1978. In my judgment the President was correct in finding that the machine did not break down completely because P.W.1 stated on cross-examination: "What I meant by saying the machine completely broke down from May to August 1978 was that it could not produce the finer finish product". It is necessary to examine the evidence to determine whether there were defective parts or defaults of manufacture of the machine causing any loss to the Plaintiff during the period from May 20, 1978 to August 30, 1978. Relating to the need for repairs to the machine P.W.1 testified under examination-in-chief as follows:

"After they (the Defendant) installed it (the machine), they showed me how to operate, but they did not explain clearly. The machine did not work satisfactorily. Some of the products produced by the machine were similar to the one they showed me and some were not. Defendant told me to buy another part ..... The part is for producing better products. The part is Microfin. They told me that with the Microfin the machine would work satisfactorily ... After the Microfin had been purchased and delivered and fixed to the machine, it did not work satisfactorily because the mechanic made a mistake in fixing the wiring and the machine broke down as soon as it was switched on. When the machine broke down, I asked the Defendant to come and repair it. The Defendant was not successful in repairing it because they did not have a mechanic who specialised in this type of machine ..... After August, 1978 the machine worked satisfactorily. I did not at any time prevent the mechanic of the Defendant from repairing the machine. The machine was not working satisfactorily for about six months. During the six months, the machine broke down completely for about three months. It was from May to August 1978 ....."

On cross-examination P.W.1 testified:

"I now agree that Microfin was not part of the machine. It was an additional part. I agree that the machine could operate without the Microfin. I disagree that the machine did not break down and that it could be operated throughout ... What I meant by saying the machine completely broke down from May to August 1978 was that it could not produce the finer finish product. I agree that in May 1978 one Mr. Yap from the Defendant Company came to repair the machine ..."

It should be noted that in his evidence P.W.1 did not specify any part of the machine to be defective, nor did he specify any default of manufacture of the machine. But he stated in general terms that "the machine did not work satisfactorily" and that "the machine broke down". He did not say in what way the machine did not work satisfactorily. Moreover P.W.1's evidence that the machine did not work satisfactorily during the time before May 20, 1978 is not relevant because this was not pleaded in the Statement of Claim. From the above evidence of P.W.1 it is clear that he alleged the "break down" from May to August 1978 as the result of mistake of the mechanic in fixing the Microfin. The alleged mistake or negligence of the mechanic was not pleaded in the Statement of Claim, and it is not relevant in considering whether the Defendant was liable for damages under P1. Moreover P1 which was dated July 5, 1977 had nothing to do with the Microfin which was bought by the Defendant under contract P3A dated January 12, 1978. Therefore in my judgment it is not correct for the President to find that the Defendant was liable for damages under P1 in respect of the failure of the machine to produce the product as expected by the Plaintiff, from May to August, 1978.

As regards issues (g), (h) and (i) there was evidence adduced both on behalf of the Plaintiff and the Defendant but the President's Grounds of Judgment does not show that he considered the evidence. This is another reason why his decision should be set aside.

I allow the appeal and order that the Presi-

dent's judgment be set aside. The Plaintiff's claim is dismissed. Costs to the Appellant in this court and in the Sessions Court.

Appeal allowed.

Solicitors: *Kassim Tadin, Wai & Co.; Tan Jin Chor & Co.*

LEE BOON TATT & ORS. v. TAKHDIR TRADING SDN. BHD.

[O.C.J. (Mohamed Dzaiddin J.) April 3 & July 5, 1984]

[Penang – Civil Suit No. 509 of 1983]

Practice & Procedure – Writ of Summons – Whether Writ had been properly served – R.H.C. 1980, O.62 r.4(1)(b).

This application arose from the plaintiffs' action against the defendants for recovery of vacant possession of premises No. 39, Chulia Street, Penang. The Writ of Summons was served by the plaintiffs on the defendants on August 24, 1983 by pre-paid registered post addressed to the defendants at No. 103, Bangunan Malayan Banking, First Floor, Jalan Union, Penang and at premises No. 39, Chulia Street, Penang which the plaintiffs had claimed to be the registered and business offices respectively of the defendants. The A.R. Registered retour cards were endorsed and acknowledged by the defendants on August 29, 1983.

The defendants applied to strike out the plaintiffs' action on the ground that the Writ of Summons was never served on them at the registered office. They maintained that at all material times the registered address for service (being the registered office) of the defendants under the Companies Act 1965 was at No. 31 China Street Ghaut, Penang.

Held, dismissing the defendants' application: (1) it was not the legislative intention to limit service only at the registered office. The rule (O.62 r.4(1)(b)) says if there be more offices than one, then service may be effected at the principal office which should mean the principal place of business of the corporation;

(2) on the facts of this case, the principal place of business of the defendants at the material time was No. 39, Chulia Street, Penang and the service of the Writ by A.R. Registered post was good and effective service. The defendants in this case had become aware of the service of the said Writ.

Cases referred to:

(1) *Wood* v. *Anderston Foundary Co.* 36 W.R. 918.
(2) *Pelajaran Nasional Indonesia* v. *Joo Seang & Co. Ltd.* [1958] M.L.J. 113.
(3) *Addis Ltd.* v. *Berkeley Supplies Ltd.* [1964] 1 W.L.R. 943.

CIVIL SUIT.

Yu Meng Queng for the plaintiffs.
Balwant Singh for the defendants.

Cur. Adv. Vult.

Mohamed Dzaiddin J.: This application arose from the plaintiffs' action against the defendants for recovery of vacant possession of premises No. 39, Chulia Street, Penang based on a tenancy agreement entered into between the plaintiffs and Syarikat Asian Enterprises as the tenant on December 29, 1975.

The Writ of Summons in this action was served by the plaintiffs on the defendants on August 24, 1983 by pre-paid registered post addressed to the defendants at No. 103, Bangunan Malayan Banking, First Floor, Jalan Union, Penang and at premises No. 39, Chulia Street, Penang which the plaintiffs had claimed to be the registered and business offices respectively of the defendants. The A.R. Registered retour cards were endorsed and acknowledged by the defendants on August 29, 1983.

The defendants had applied to strike out the plaintiffs' action on the ground that the Writ of Summons was never served on them at the registered office. They maintained that at all material times the registered address for service (being the registered office) of the defendants under the Companies Act 1965 was at No. 31, China Street Ghaut, Penang. (See the affidavit of Encik M.S.A. Zachariah affirmed on September 16, 1983). This was confirmed by a letter from the Assistant Registrar of Companies, Penang Branch dated October 14, 1983. (See exhibit "MSA 1" to the affidavit of Encik Zachariah affirmed on October 31, 1983).

Clearly, the provisions for service of documents on corporations are governed by O.62, r.4(1) of the Rules of the High Court, 1980.

Order 62 rule 4(1) reads as follows:

"4.(1) Where an action is against a corporation, the writ may be served –

(a) by leaving a copy of it at the registered office (if any) of the corporation; or

(b) by sending a copy of it by registered post addressed to the corporation at the office, or, if there be more offices than one at the principal office of the corporation, whether such office be situated within Malaysia or elsewhere; or